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IN THE

Supreme Court of the United States.

No. 484.

October Term, 1948.

JOSEPH C. SHARBLE,
Petitioner,

v.

KUEHNLE-WILSON, INC.,
Respondent.

CHARLES HOOKER,
Petitioner,

v.

KUEHNLE-WILSON, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The facts in the case as set forth by the petitioners in the "Statement of Facts" in their Petition for Writ of Certiorari are substantially correct, except in the following two particulars:

First, the impression is given that the same petitions for reargument were acted upon by the Supreme Court of Pennsylvania and "refused, first on July 6, 1948, and

finally, on October 1, 1948." The pertinent facts in this respect are as follows:

The Supreme Court of Pennsylvania on May 24, 1948, entered judgment for the respondent in each of the two appeals (243a, 244a, 270a). On June 3, 1948, a joint petition for reargument was filed in each case (243a, 244a, 271a). On July 6, 1948, said petition for reargument was refused in each case (243a, 244a). On August 4, 1948, practically a month after the aforesaid refusal and after the record had been remitted to the court-below, the petitioners filed in each case a joint petition for leave to file a supplemental petition for reargument (243a, 244a, 280a), and at the same time the petitioners, notwithstanding the fact that they had not received the requested permission to file a supplemental or second petition for reargument, nevertheless filed in each case a joint supplemental petition for reargument (243a, 245a, 282a) as well as a brief in support thereof (285a). On October 1, 1948, the Supreme Court of Pennsylvania in each case refused the aforesaid petition for leave to file a second or supplemental petition for reargument (243a, 245a) and on the same date refused any reargument in either case (243a, 245a).

Second, the petitioners state that "the jury could have found that the reason for the sheets slipping was that the painting contractor had not allowed the paint to dry adequately, and had in fact mistakenly assured the petitioners' employer that the paint had dried sufficiently for them to proceed with their work." The record does not warrant such a statement. In fact, the contrary is true, as was so found by the Supreme Court of Pennsylvania (265a-270a).

ARGUMENT.

I. Petition for Writ of Certiorari Was Not Filed Within Three Months After Entry of Judgment.

The Petition for Writ of Certiorari was not filed in this case within the three months' period provided for in Section 2101 (c) of the Judicial Code, effective September 1, 1948. Title 28, United States Code, Section 2101 (c).

The judgments appealed from were each entered by the Supreme Court of Pennsylvania on May 24, 1948 (243a, 244a, 270a). On June 3, 1948, a joint petition for reargument was filed in each case (243a, 244a, 271a). On July 6, 1948, said petition for reargument was refused in each case (243a, 244a). On August 4, 1948, practically a month after the aforesaid refusal and after the record had been remitted to the court-below, the petitioners filed in each case a joint petition for leave to file supplemental petition for reargument (243a, 244a, 280a), and at the same time the petitioners, notwithstanding the fact that they had not received the requested permission to file a supplemental or second petition for reargument, nevertheless filed in each case a joint supplemental petition for reargument (243a, 245a, 282a) as well as a brief in support thereof (285a). On October 1, 1948, the Supreme Court of Pennsylvania in each case refused the aforesaid petition for leave to file a second or supplemental petition for reargument (243a, 245a) and on the same date refused any reargument in either case (243a, 245a).

While the running of the three months' period within which petitioners could file a petition for writ of certiorari was suspended by the filing of their petitions for reargument on June 3, 1948, the time which had began to run again from the denial of said petitions on July 6, 1948, had long since expired before December 3, 1948, when petition for writ of certiorari was filed with your Honorable Court.

Further suspension of the time for filing a petition for writ of certiorari cannot be obtained by the mere

presentation in the state court of an additional petition for leave to file a second petition for reargument. *Gypsy Oil Company v. Leo Bennett Escoe,* 275 U. S. 498 (1927); *Morse v. United States,* 270 U. S. 151 (1926). Obviously, the mere filing of a second petition for reargument which is refused should not extend the time for procuring a writ of certiorari. If it did, a third, fourth and many other petitions for leave to file another petition for reargument might be filed upon refusal of the previous petition, and the time for filing a petition for writ of certiorari might be extended *ad infinitum.*

Petitioners cite the case of *Department of Banking of Nebraska, Receiver v. Pink, Superintendent of Insurance of the State of New York,* 317 U. S. 264 (1942), as authority for the proposition that their petition for writ of certiorari has been filed within the statutory time. That decision does not support such a proposition. The question in that decision concerned solely the effect of a motion in the Court of Appeals of New York to amend its remittitur to the court-below. Your Honorable Court merely held in that case that such motion did not have the same legal effect as an original or first petition for reargument so as to suspend the running of the appeal period. Moreover, nothing was said in that case concerning the filing of a *second* petition for reargument or the filing of a petition for leave to file a second petition for reargument. That decision has not in any way (either directly or inferentially) overruled the well established rulings of your Honorable Court that the presentation of a second petition for reargument does not suspend the running of the three months' period within which a petition for certiorari must be filed.

The Petition for Writ of Certiorari filed herein should therefore be denied on the authority of the above cited cases of *Gypsy Oil Company v. Leo Bennett Escoe,* 275 U. S. 498 (1927) and *Morse v. United States,* 270 U. S. 151 (1926).

II. No Federal Question Was Mentioned in This Case Until the Filing of Petition for Leave to File Second Petition for Reargument.

The supposed federal question was not mentioned in the state courts until after the Supreme Court of Pennsylvania had not only heard full argument on appeal and rendered its decision but had also refused the petitioners' first petition for reargument.

If the petitioners would have been deprived under an adverse decision of any rights secured by the Constitution of the United States (which alleged deprivation we deny), they could and should have raised such question when the respondent filed its motion for judgment non obstante veredicto in the court of first instance (226a) so that that court could have had an opportunity to consider such question. The petitioners, however, failed to do so. Furthermore, the petitioners could and should have raised such question when the appeals were being argued before the Supreme Court of Pennsylvania if they believed that an adverse decision would deprive them of any constitutional guarantee, but they failed to do so. Finally, the petitioners had a still further opportunity of raising such question in their petition for reargument before the Supreme Court of Pennsylvania, but they failed likewise to do so.

Obviously, the so-called federal question was an afterthought on the part of petitioners knowing there is nothing further that they can present to the courts of Pennsylvania but with the hope that thereby Your Honorable Court may by some remote possibility take up the case for consideration notwithstanding the well considered and unanimous opinion of the Supreme Court of Pennsylvania.

It is well settled that Your Honorable Court will not consider federal questions that have not been properly presented for decision in the highest court of a state and that ordinarily Your Honorable Court will not consider conten-

tions first made in a state court by a petition for rehearing unless the court actually entertains the question and decides it. *Herndon v. Georgia,* 295 U. S. 441, 443 (1935); *Missouri ex rel. Missouri Insurance Co. v. Gehner, Assessor,* 281 U. S. 313, 320 (1930). It is essential that a federal question be raised at the first opportunity. *Brinkerhoff-Faris Trust and Savings Company v. Hill, Treasurer,* 281 U. S. 673, 678 (1930).

Since the petitioners in this case failed to raise the supposed federal question at their first opportunity, the mentioning of the same in a petition for leave to file a second petition for reargument which the state court refused to accept was not timely for purposes of review, and the petition for writ of certiorari should therefore be denied.

III. The Supreme Court of Pennsylvania Properly Entered Judgment for the Respondent on the Evidence Adduced at Trial.

The Supreme Court of Pennsylvania in an unanimous opinion, after "viewing the testimony in the light most favorable to plaintiffs" correctly held that the evidence was entirely inadequate to prove negligence on the part of respondent and properly entered judgment for the respondent.

The Supreme Court of Pennsylvania was not substituting itself for the jury to determine whether or not the respondent was negligent, but merely determining whether the evidence was sufficient to sustain a verdict. Since there were no eye witnesses to the accident, it was necessary for the plaintiffs to produce such circumstantial evidence that there could be only one *reasonable* inference therefrom—namely, that the respondent was negligent. *Donaldson v. Pittsburgh Railways Company,* 358 Pa. 33 (1947). The petitioners were not deprived by the Supreme Court of

Pennsylvania of any right guaranteed by the Constitution of the United States—either the right to trial by jury or the equal protection of the laws.

The petitioners in their argument have erroneously assumed that there was sufficient evidence from which negligence of the respondent could be inferred, which assumption was the very question argued before the Supreme Court of Pennsylvania, namely, whether the sheets fell by reason of wet paint on a roof which the respondent's foreman had indicated was ready for use, or whether the sheets fell from some other cause.

There is no conflict in the decisions of the Supreme Court of Pennsylvania, nor does that Court have two separate standards of proof, either one of which may be applied to any particular case as that Court may see fit. The statement that a plaintiff need not "exclude everything which the ingenuity of counsel may suggest as possibly causing or contributing to an accident" is merely the converse way of expressing the same principle that a plaintiff's testimony must provide the only *reasonable* inference that the defendant was negligent. In other words there must be a *reasonable* basis for a case to go to the jury.

In this case the Supreme Court of Pennsylvania did not consider *conflicting* circumstantial evidence and inferences to be drawn therefrom, but, after reviewing the reasonableness of the inference or inferences which the jury might draw from the circumstantial evidence adduced by the petitioners, determined that a jury could not infer negligence from such evidence.

CONCLUSION.

We, therefore, submit that:

1. The petition for writ of certiorari was not filed within the three months' period;

2. There is no real federal question here, and, even if there were, it has not been raised timely for purposes

of review since no mention was made at any time in the state court of first instance and not in the Supreme Court of Pennsylvania until the filing of a petition for leave to file a second petition for reargument; and

3. The Supreme Court of Pennsylvania properly entered judgment for the respondent on the evidence adduced at trial.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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GEORGE M. BRODHEAD,
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